

1990

# Nicholas V. Banner v. Utah Department of Corrections, and Utah Board of Pardons : Brief of Appellee

Utah Court of Appeals

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Nicholas V. Banner; Appellant Pro Se.

R. Paul Van Dam; Attorney General; C. Dane Nolan; Assistant Attorney General; Attorneys for Appellees.

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT  
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DOCKET NO.

900113-CA

IN THE UTAH COURT OF APPEALS

NICHOLAS V. BANNER,

Appellant,

vs.

UTAH DEPARTMENT OF CORRECTIONS,  
and UTAH BOARD OF PARDONS,

Appellees.

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PRIORITY NO. 3

CASE NO. 900113-CA

BRIEF OF APPELLEES

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY  
THE HONORABLE JOHN ROKICH PRESIDING

TO REVIEW AN ORDER GRANTING A MOTION TO DISMISS  
A PETITION FOR A WRIT OF HABEAS CORPUS

NICHOLAS V. BANNER  
Appellant Pro Se  
Sevier County Jail  
250 North Main Street  
Richfield, Utah 84701

R. PAUL VAN DAM (3312)  
Utah Attorney General  
C. DANE NOLAN (4891)  
Assistant Attorney General  
6100 South 300 East, Suite 403  
Salt Lake City, Utah 84107

Attorneys for Appellees

FILED

AUG 9 1990

COURT OF APPEALS

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R. PAUL VAN DAM (3312)  
Utah Attorney General  
C. DANE NOLAN (4891)  
Assistant Attorney General  
6100 South 300 East, Suite 403  
Salt Lake City, Utah 84107

Attorneys for Appellees

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#### JURISDICTION AND NATURE OF THE PROCEEDINGS BELOW

This Court has jurisdiction of this appeal pursuant to Rules 3 and 4 of the Utah Court of Appeals and Utah Code Ann. §78-2a-3(g) (Supp. 1990). The District Court denied Mr. Banner's application for issuance of a writ of habeas corpus and instead granted the Board of Pardons motion to dismiss.

#### DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Code Ann. §77-27-5(1)(a) (Supp. 1990)

The Board of Pardons shall determine by majority decision when and under what conditions, subject to this chapter and other laws of the state, persons committed to serve sentences in class A misdemeanor cases at penal or correctional facilities which are under the jurisdiction of the Department of Corrections, and all felony cases except treason or impeachment or as otherwise limited by law, may be released upon parole, pardoned, restitution ordered, or have their fines, forfeitures, or restitution remitted, or their sentences commuted or terminated.

Utah Code Ann. §77-27-5(3) (Supp. 1990)

Decisions of the Board of Pardons in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review. Nothing in this section prevents the obtaining or enforcement of a civil judgment.

Utah Code Ann. §77-27-9(1) (Supp. 1990)

The Board of Pardons may pardon or parole any offender or commute or terminate the sentence of any offender committed to a penal or correctional facility which is under the jurisdiction of the Department of Corrections for a felony or class A misdemeanor except as otherwise provided in Subsection (2). The release of an offender shall be at the initiative of the board,

which shall consider each case as the offender becomes eligible. However, a prisoner may submit his own application, subject to the rules of the board.

#### STATEMENT OF CASE

On June 24, 1986 Mr. Banner received a one year to fifteen year sentence for the crime of sexual abuse of a child. Mr. Banner was also convicted of lewdness involving a child, a class A misdemeanor. (Record, p. 14; Plaintiff's Docketing Statement, p. 2; Attachment A to this Brief). Mr. Banner was originally incarcerated relating to his conduct for which he was eventually convicted in December 1983. (Record p. 15; Plaintiff's Docketing Statement, p. 3). Mr. Banner was originally imprisoned at the Utah State Prison relating to his conduct for which he was eventually convicted in December 1984. He was incarcerated pursuant to a judgment and commitment which was later overturned by the Utah Supreme Court. (State v. Banner, 717 P.2d 1325 (Utah 1986); Plaintiff's Docketing Statement, p. 2).

In July 1986 the Utah Board of Pardons conducted a hearing in which the issue of whether Mr. Banner should be released prior to the expiration of his one year to fifteen year sentence was considered. The Board determined that Mr. Banner should not be released. The Board did decide to conduct a hearing to reconsider the issue in December, 1990. (Record, pp. 14-15; Attachment A to this Brief).

Subsequently, the Third Judicial District Court, Salt Lake County, State of Utah, granted Mr. Banner credit for time served

between December 1983 and December 1984 against his sentence. (Record, p. 14; Plaintiff's Docketing Statement, p. 3).

Afterwards the Board of Pardons amended Mr. Banner's expiration date to December 1998 to reflect the sentencing Court's order granting credit for time served. (Record, p 14).

In December 1989 Mr. Banner petitioned the District Court below to issue a writ of habeas corpus contending that the Board of Pardons had unconstitutionally refused to accelerate his rehearing date from December 1990 to December 1989 because of the sentencing Court's granting of credit for time served. (Record, pp. 2-4).

The District Court refused to issue the writ of habeas corpus and instead granted the Board of Pardons' motion to dismiss. In it's Order the District Court stated:

1. The Court finds that the plaintiff's incarceration is neither unlawful nor unconstitutional in that the plaintiff is serving time under a lawful commitment order which provides for his incarceration for an indeterminate term which is not scheduled to expire until December of 1998.

2. The Court finds further that the Board of Pardons has exclusive authority to determine when and if it will hear the plaintiff and whether he will be granted parole, and that the Court has no authority to change the plaintiff's currently anticipated rehearing date before the board in December of 1990.

3. The Court specifically recommends to the Board, however, that they reschedule the plaintiff's rehearing date to hear his case sooner.

(Record, pp. 24-25).



## ARGUMENT

I. MR. BANNER HAS NO CONSTITUTIONAL RIGHT TO BE RELEASED FROM PRISON BY THE UTAH BOARD OF PARDONS PRIOR TO THE EXPIRATION OF HIS SENTENCE OR TO BE CONSIDERED FOR SUCH RELEASE BY THE BOARD.

Under Utah's legislatively mandated sentencing scheme (Utah Code Ann. §76-3-101 et. seq. (Supp. 1990)) and the legislation creating the Utah Board of Pardons (Utah Code Ann. §77-27-1 et. seq. (Supp. 1990)) the Board has exclusive authority to determine whether a person who has been incarcerated will be released prior to the expiration of their sentence. Utah Code Ann. §77-27-5(3) reads:

Decisions of the Board of Pardons in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review. Nothing in this section prevents the obtaining or enforcement of a civil judgment.

In reviewing the sentencing scheme the Utah Supreme Court has stated that Utah's "sentencing system vests almost complete discretion in the Board of Pardons to determine the period of time that will actually be served." State v. Schreuder, 712 P.2d 264, 277 (Utah 1985).

Utah Code Ann. §77-27-9(1) (1953 as amended) states:

The Board of Pardons may pardon or parole any offender or commute or terminate the sentence of any offender committed to a penal or correctional facility which is under the jurisdiction of the Department of Corrections for a felony or class A misdemeanor except as otherwise provided in Subsection (2). The release of an offender shall be at the initiative of the board, which shall consider each case as the offender becomes eligible. However, a prisoner may submit his own application, subject to the rules of the board.

(emphasis added).

The Utah Supreme Court, Utah Court of Appeals, United States Supreme Court, 10th Circuit Court of Appeals, and Utah Federal District Court have all ruled that the Utah sentencing scheme and Board of Pardons' legislative promulgations do not grant a constitutional right to an incarcerated person to be released prior to the expiration of his sentence. Homer v. Morris, 684 P.2d 64 (Utah 1984); Hatch v. DeLand, 131 Utah Adv. Rep. 26 (Utah Ct. App. 1990); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Board of Pardons v. Allen, 482 U.S. 369 (1987) fnte 10; Dock v. Latimer, 729 F.2d 1287, 1290 (10th Cir. 1984), cert. denied, 469 U.S. 885 (1984); Houtz v. DeLand, 718 F.Supp. 1497 (D. Utah 1989).

In Hatch v. Deland, this Court stated:

[A]bsent statutory language limiting a parole board's discretion, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz, 442 U.S. at 7, 99 S. Ct. at 2104. . . .

Utah's parole statute contains no statutory limitations on the Board's discretion to grant or deny parole. Utah Code Ann. sec. 77-27-9(1) (Supp. 1989) provides, in relevant part: "The Board of Pardons may pardon or parole any offender or commute or terminate the sentence of any offender committed to a penal or correctional facility which is under the jurisdiction of the Department of Corrections for a felony or a class A misdemeanor . . . ." The statute precludes parole for certain offenses until the minimum term for the offense has been served. Under the controlling precedents, we hold that the Utah parole statute does not create an "expectation of parole" that would subject parole board proceedings to due process protections. See also, Dock v. Latimer, 729 F.2d 1287, 1290 (10th Cir. 1984), cert. denied, 469 U.S. 885 (1984) (concluding that the previous Utah parole statute did not create a liberty interest subject to due process protections).

The Board of Pardons is entirely free to determine prisoners should not be released from prison until they have served the full measure of their sentences. Included in that freedom is the power to schedule hearings and rehearings to consider whether certain prisoners should be released prior to the expiration of their sentences.

Mr. Banner has not pointed to any source of authority which would somehow constitutionally obligate the Board of Pardons to grant him an immediate rehearing date because the sentencing Court granted him credit for time served. The sentencing Court's order obligated the Board to amend Mr. Banner's expiration date. That has been done. However, under the relevant legislation and case law the Board has the power to refuse to give Mr. Banner a rehearing before his already scheduled hearing in December 1990.

Thus, the District Court was correct in refusing to issue a writ of habeas corpus and in dismissing Mr. Banner's petition. If no constitutional right exists no constitutional violation can occur. And if no constitutional violation has occurred no writ of habeas corpus can be issued. Malek v. Sawaya, 730 P.2d 629 (Utah 1986).

## II. MR. BANNER'S ARGUMENT IS FACTUALLY FLAWED.

Mr. Banner's entire argument is based upon his belief that in July 1986 the Board of Pardons ruled that it would rehear his case after he had served six years of his sentence and that the Board of Pardons believed his service of that sentence began in

December 1984.

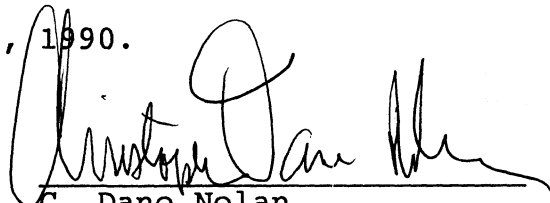
However, Mr. Banner's premise is incorrect. The final official written order issued by the Board of Pardons on July 30, 1986 states that Mr. Banner was to be scheduled for a rehearing in December 1990. It does not state that he is to be scheduled for a rehearing after six years of service of his sentence. In fact there is no indication that the Board's scheduling of a rehearing would hinge upon the length of time Mr. Banner has served. (Attachment A to this Brief). Additionally, Mr. Banner has failed to provide any proof that in July 1986 it was the Board of Pardons' belief that he began to serve his sentence in December 1984. It is at least as likely that they knew his incarceration began in December 1983 and that they made the decision to give him a rehearing date in December 1990 with that knowledge.

Because Mr. Banner's argument is based upon two incorrect premises, it should be rejected and the decision of the District Court affirmed.

#### CONCLUSION

For the reasons set forth above Mr. Banner's appeal should be dismissed and the ruling of the District Court affirmed.

DATED THIS 7TH DAY OF AUGUST, 1990.

A handwritten signature in black ink, appearing to read "C. Dane Nolan", is written over a horizontal line.

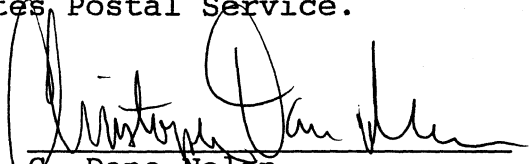
C. Dane Nolan  
Assistant Attorney General  
Attorney for Appellees

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of August, 1990 I caused to be mailed a true and correct copy of the above and foregoing Brief of Appellees to:

NICHOLAS V. BANNER  
Appellant  
Sevier County Jail  
250 North Main Street  
Richfield, Utah 84701

postage prepaid in the United States Postal Service.



C. Dane Nolan  
Assistant Attorney General  
Attorney for Appellees



Exhibit A

PAUL W. SHEFFIELD  
Administrator

# THE STATE OF UTAH

BOARD OF PARDONS  
6065 South 300 East  
Salt Lake City Utah 84107

## MEMBERS

GARY L. WEBSTER  
VICTORIA J. PALACIOS  
DENNIS M. FUCHS

## BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH

Consideration of the Status of Nicholas Vaughn Banner  
Utah State Prison No 17049

The above-entitled matter came on for a Hearing before the Utah State Board of Pardons on the 30 day of July, 1986 at the regularly scheduled hearing time for consideration as

- |  |   |
|--|---|
| 1 <input checked="" type="checkbox"/> ORIGINAL HEARING | 5 <input type="checkbox"/> SPECIAL ATTENTION      |
| 2 <input type="checkbox"/> REHEARING                   | 6 <input type="checkbox"/> ATTENTION OF THE BOARD |
| 3 <input type="checkbox"/> REDETERMINATION             | 7 <input type="checkbox"/> PAROLE VIOLATION       |
| 4 <input type="checkbox"/> TERMINATION OF SENTENCE     | 8 <input type="checkbox"/> RESCISSION HEARING     |

After the statement of \_\_\_\_\_ and the following witness 1) \_\_\_\_\_ 2) \_\_\_\_\_ 3) \_\_\_\_\_, and good cause appearing, the Board made the following decision:

- ☐ Rescind \_\_\_\_\_, 19\_\_\_\_ parole date, \_\_\_\_\_
- ☐ Parole to become effective \_\_\_\_\_, 19\_\_\_\_, with the following special conditions:
- ☐ Amend parole agreement to add the following special conditions:
- A. \_\_\_\_\_
- B. \_\_\_\_\_
- C. \_\_\_\_\_
- D. \_\_\_\_\_
- ☒ Rehearing for Dec, 1970, for the following reasons:
- A. Monitor progress in therapy
- B. Nature crime
- C. Need for to know of reduce risk.
- ☐ Termination of Sentence and Parole to become effective \_\_\_\_\_, 19\_\_\_\_.
- ☐ Expiration of Sentence \_\_\_\_\_, 19\_\_\_\_.

REMARKS: \_\_\_\_\_

1 <u>Sexual abuse of a child</u>	<u>1-15</u>	<u>CR-83-1680</u>	<u>Jay E. Banks</u>
CRIME	SENTENCE	CASE NO	JUDGE
2 <u>Lewdness involv. a child</u>	<u>Class A</u>	<u>CR-83-1680</u>	<u>" "</u>
CRIME	SENTENCE	CASE NO	JUDGE
3 _____	SENTENCE	CASE NO	JUDGE
CRIME	SENTENCE	CASE NO	JUDGE
4 _____	SENTENCE	CASE NO	JUDGE
CRIME	SENTENCE	CASE NO	JUDGE
5 _____	SENTENCE	CASE NO	JUDGE
CRIME	SENTENCE	CASE NO	JUDGE

It is further ordered that in the event the above named shall be found guilty of any infraction of Rules and Regulations of the Utah State Prison, of any Community Correction Center or of any residential facility or shall fail or refuse to perform duties as assigned or is found in violation of any other law of the State of Utah prior to the effective date of this decision the order may be made null and void

By Order of the Board of Pardons of the State of Utah I have this date July 30, 1986 1986 affixed my signature as Administrator for and on behalf of the State of Utah, Board of Pardons

PAUL W. SHEFFIELD, ADMINISTRATOR

An application for redetermination may be made after one year from the Board's previous action. Applications shall be made on a form provided by the Board and obtained through the housing unit case manager